

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MOUNTBATTEN SURETY COMPANY, INC.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
REAGERHARRIS INC. and ACCORDIA OF	:	NO. 99-3052
KENTUCKY, INC.,	:	
Defendants.	:	

**Memorandum and Order**

YOHN, J.

January 18, 2000

Mountbatten Surety Co. (“plaintiff”) brought this diversity suit against ReagerHarris Inc. and Accordia of Kentucky, Inc., (together “defendant”)<sup>1</sup> alleging causes of action in tort and contract arising out of defendant’s alleged breach of an agency agreement. Before the court is defendant’s motion to dismiss the complaint for lack of personal jurisdiction and improper venue or, in the alternative, to transfer the case to federal court in Kentucky.

Early in 1996, plaintiff became licensed to provide surety bonds in Kentucky. Plaintiff solicited defendant and other Kentucky surety-oriented agencies in the hopes of establishing an agency relationship with one or more in that state. Defendant responded and, after some

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<sup>1</sup> In 1998, Accordia of Kentucky purchased ReagerHarris after the relevant contractual relationship was formed but prior to the filing of this action. *See* Def.’s Mot. to Dismiss or Transfer Ex. A ¶ 1 (Doc. No. 9). The parties dispute whether Accordia of Kentucky is the successor-in-interest to ReagerHarris. That issue is not before the court and I make no findings or conclusions in that regard. For purposes of this motion and because the two corporations do not appear to exist contemporaneously, I will refer to the two named parties as “defendant.”

negotiation, the parties entered a formal contract in May of 1996. In 1997, defendant received from plaintiff conditional approval of a bond issue for a construction project. Defendant issued the bond but did not comply with plaintiff's conditions. In time, the bonded party defaulted and plaintiff fulfilled its obligations under the bond. Plaintiff filed this action seeking damages from defendant for breach of contract and several torts.

Defendant has moved the court to dismiss the action both because there is no personal jurisdiction in Pennsylvania and because this forum is improper. In the alternative, defendant requests that the matter be transferred to federal court in Kentucky. Because I conclude that personal jurisdiction is proper under a specific jurisdiction theory, and because I conclude that the forum chosen by plaintiff will cause neither inconvenience nor injustice, I will deny the motion.

## **BACKGROUND**

Plaintiff is a Pennsylvania corporation in the business of issuing surety bonds. *See* Compl. ¶ 4 (Doc. No. 1); Pl.'s Resp. to Def.'s Mot. to Dismiss Ex. A ¶ 4 (Doc. No. 11) (hereafter "Pl.'s Resp."). Defendant is a Kentucky corporation in the business of brokering surety bonds and insurance. *See* Def.'s Mot. to Dismiss or Transfer Ex. A ¶ 4 (Doc. No. 9) (hereafter "Def.'s Mot.>").

On April 11, 1996, plaintiff sent a letter by fax to defendant and others soliciting interest in "agency appointments" from "a limited few professional surety-oriented agencies" in Kentucky. *See* Def.'s Reply Memo. in Support of Def.'s Mot. to Dismiss or Transfer Ex. A

(Letter of Stephen C. Fletcher) (Doc. No. 12) (hereafter “Def.’s Reply”). That same day, defendant responded by expressing an interest in a “potenti[al] future relationship.” *See* Def.’s Reply Ex. B (Letter of Todd P. Loenhert). In a letter of April 15, 1996, plaintiff provided defendant with information about commissions, rates, and response times, as well as a copy of plaintiff’s standard agency agreement and forms. *See* Def.’s Reply Ex. C. Also, plaintiff requested further information from defendant. *See id.* at 1. On April 15, 1996, in response, defendant sent to plaintiff an agency profile, including employee biographies, and suggested several dates on which it could meet with plaintiff. *See* Pl.’s Resp. Ex. A(2). On April 30, 1996, plaintiff visited defendant’s offices in Kentucky. *See* Def.’s Supplement to Mot. to Dismiss Exs. 1 & 2 (Doc. No. 13) (hereafter “Def.’s Supp.”); Pl.’s Resp. Ex. A(1) at 2 (“We look forward to having you back in our territory in the near future . . .”). On May 9, 1996, defendant sent to plaintiff “the agency agreement and additional paperwork for licensing of ReagerHarris with the Mount Batten [sic] Surety Company.” *See* Pl.’s Resp. Ex. A(1). The letter and agreement were received by plaintiff on May 10, 1996.<sup>2</sup> *See id.* (date stamp).

Several of the twenty-five numbered paragraphs of the agreement are relevant to the questions presented on this motion. Defendant agreed to be plaintiff’s agent subject to the terms and conditions of the agreement. *See* Pl.’s Resp. Ex. A(3) ¶¶ 1-3. The agreement contemplated that defendant would send certain transaction-related papers to plaintiff in Pennsylvania, including copies of bonds executed by defendant, premiums collected by defendant, and account

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<sup>2</sup> The dates of execution are unclear from the evidence. The executed agreement bears a date of May 8, 1996. *See* Pl.’s Resp. Ex. A(3). It was attached to a letter sent by plaintiff on May 9, 1996, and received by defendant on May 10, 1996. *See* Pl.’s Resp. Ex. A(1). The order and dates of execution are not denoted at the end of the letter. Nothing appears to turn on the order of signing. I make no conclusive finding of fact as to order and date of execution.

records. *See id.* ¶¶ 3-4 & 9. Further, defendant agreed to notify plaintiff of any information concerning potential claims. *See id.* ¶ 10. Defendant also agreed to “indemnify, defend and hold harmless” plaintiff for the consequences of defendant’s conduct and to maintain insurance “against errors and omissions, defalcation and coverage with respect to the contractual indemnification.” *See id.* ¶¶ 17-18. The agreement was to be governed by the laws of Pennsylvania. *See id.* ¶ 21. The agreement also provided for arbitration in Philadelphia at the option of either party. *See id.* ¶ 23. The contract appears to be a form contract. *See* Def.’s Mot. Ex. A ¶ 22.

After signing the agreement, defendant sent correspondence to plaintiff regarding potential bond issues. *See* Pl.’s Resp. Ex. A ¶¶ 17-18. John Meehan, an Account Executive with defendant, *see* Pl.’s Resp. Ex. A(2) at 8, noted on September 4, 1997, that provision of a Performance and Payment bond for an Indiana construction project “should not be a problem.” *See* Pl.’s Resp. Ex. A(4) at 1-2. On September 17, 1997, plaintiff approved issuing the Indiana bond conditioned on defendant taking five additional steps. *See* Pl.’s Resp. Ex. A(4) at 3 (Fax of Richard T. Leadem). Defendant issued the bond without fully complying with the five conditions. *See* Pl.’s Resp. Ex. A(4) at 4 (Fax of Susan Abbott of Feb. 19, 1998). Plaintiff refused approval of another bond issue for the same bonded party in the absence of full compliance with the conditions on the issue of the first bond. *See id.*<sup>3</sup>

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<sup>3</sup> In early 1998, Accordia of Kentucky purchased ReagerHarris. *See* Pl.’s Resp. Ex. A ¶ 29; Def.’s Mot. Ex. A ¶ 1. Consequently, plaintiff and defendant entered a new agency agreement. *See* Pl.’s Resp. Ex. A(5) (hereafter “1998 Agreement”). On April 2, 1998, defendant sent plaintiff two executed copies of the 1998 Agreement. *See id.* They were received by plaintiff on April 3, 1998. *See id.* Again, the agreement appears to be in the nature of a form contract. *See id.* In most relevant parts, the language remained the same as the earlier agreement. One difference is notable: In addition to providing that the agreement shall be

This controversy arose because the Indiana bonded party was unable to meet its obligations. *See* Compl. ¶ 20; Pl.’s Resp. Ex. A ¶ 26. Consequently, construction creditors sought to collect under the Performance and Payment bonds. *See id.* Plaintiff paid those creditors and turned to defendant for indemnification. *See id.* Defendant refused, and plaintiff filed this action on June 16, 1999. Defendant has moved pursuant to Fed. R. Civ. P. 12(b)(2) to dismiss the action for lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(3) to dismiss the action because this forum is improper and, in the alternative, pursuant to 28 U.S.C. § 1404 to have the action transferred to the United States District Court for the Western District of Kentucky.

I conclude that defendant purposefully directed its activities toward a Pennsylvania citizen, purposefully availed itself of the privilege and protection of Pennsylvania’s laws, and reasonably could have foreseen that it would be haled into court in Pennsylvania. Therefore, I will deny the motion to dismiss for lack of personal jurisdiction. In addition, I conclude that venue is proper in this district and I will deny the motion to dismiss due to an improper forum. Finally, I conclude that plaintiff will suffer no inconvenience or injustice if litigation proceeds in this forum, and therefore I will deny the motion to transfer the matter to federal court in Kentucky.

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governed by Pennsylvania law, the 1998 Agreement also provides that “[a]ny action brought by either party in a court of law against the other shall be brought in either the U.S. District Court for the Eastern District of Pennsylvania or in the Court of Common Pleas for Montgomery County, Pennsylvania.” *See* Pl.’s Resp. Ex. A(5) ¶ 21. The 1998 Agreement was entered after issuance of the bond giving rise to the present dispute. It will be considered as evidence of the parties’ course of dealing, not as the controlling document. *See North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 691 (3d Cir. 1990) (citing new contract between long-time business partners as evidence of minimum contacts).

## DISCUSSION

### I. PERSONAL JURISDICTION

Whether personal jurisdiction over an out-of-state defendant is proper requires a two-part inquiry. First, a district court sitting in diversity must determine whether the long-arm statute of the forum state would permit the courts of the forum state to exercise jurisdiction over the defendant. *See* Fed. R. Civ. P. 4(e)(1); *Imo Indus. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998). Second, a district court must ask whether asserting personal jurisdiction would be consistent with the dictates of the due process clause. *See Imo Indus.*, 155 F.3d at 259. In Pennsylvania, the state long-arm statute is coextensive with the limit of due process. *See* 42 Pa. C.S.A. § 5322(B) (Purdon’s 1981 & 1999 Supp.) (extending state court jurisdiction over non-residents to “fullest extent allowed under the Constitution of the United States”); *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F. 3d 147, 150 (3d Cir. 1995). Consequently, the essential question is whether asserting personal jurisdiction over the defendant would comply with due process requirements.

The due process inquiry focuses a court’s attention on the relationship between the defendant’s conduct, the forum state, and the litigation. *See Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Imo Indus.*, 155 F.3d at 259. To satisfy the dictates of due process clause, the defendant must have purposefully directed conduct toward the forum state or must have purposefully availed itself of the protection of the laws of the forum state. *See Burger King*

*Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Imo Indus.*, 155 F.3d at 259.

Case law development over time has delineated two independent bases of personal jurisdiction. A defendant is subject to the general jurisdiction of the court regardless of where the events occurred giving rise to the action when the defendant's contacts with the forum state are continuous and systematic. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.9 & 416 (1984); *Imo Indus.*, 155 F.3d at 259 n.2. In contrast, a defendant is subject to the specific jurisdiction of the court when the events giving rise to the action are related to the forum state and the defendant has necessary minimum contacts with the forum state. *See Helicopteros Nacionales de Colombia*, 466 U.S. at 414 n.8; *Imo Indus.*, 155 F.3d at 259.

Plaintiff asserts that defendant is subject to both the general jurisdiction and the specific jurisdiction of this court. Once defendant raises a proper objection to personal jurisdiction, the plaintiff must prove the propriety of personal jurisdiction. *See Imo Indus.*, 155 F.3d at 257. A "plaintiff meets this burden and presents a prima facie case for the exercise of personal jurisdiction by 'establishing with reasonable particularity sufficient contacts between defendant and the forum state.'" *See Mellon Bank (East) PSFS, Nat'l Assoc. v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992) (citation omitted). I conclude that defendant is not subject to the general jurisdiction of the court but that the exercise of specific jurisdiction is proper in this case.

## A. General Jurisdiction

If an action arises from defendant's conduct which is not related to the forum, it requires general personal jurisdiction. *See Helicopteros Nacionales de Colombia*, 466 U.S. at 414 n.9; *Imo Indus.*, 155 F.3d at 259 n.2. To subject a non-resident defendant to the general personal jurisdiction of the court, it must be shown that the defendant maintained "continuous and systematic" contact with the forum state. *See Helicopteros Nacionales de Colombia*, 466 U.S. at 416; *Imo Indus.*, 155 F.3d at 259 n.2. Proof of such contact requires a showing of extensive and pervasive activity in the forum state. *See Reliance Steel Prods. Co. v. Watson, Ess, Marshall, & Engass*, 675 F.2d 587, 589 (3d Cir. 1982). In addition, it must be shown that assertion of personal jurisdiction would comport with traditional notions of "fair play and substantial justice." *See Imo Indus.*, 155 F.3d at 259.

While many facts are still disputed, there is no account of the facts in this matter which demonstrates "continuous and systematic" contact by the defendant with Pennsylvania. *See Helicopteros Nacionales de Colombia*, 466 U.S. at 416; *Imo Indus.*, 155 F.3d at 259 n.2. Defendant is not incorporated in Pennsylvania. *See* Def.'s Mot. Ex. A ¶¶ 2-3. Defendant does not maintain an office in Pennsylvania. *See id.* ¶ 7. Defendant has never visited plaintiff's Pennsylvania office. *See id.* ¶ 24. Defendant has no agents or employees in Pennsylvania. *See id.* ¶ 8. Defendant neither advertises nor solicits business in Pennsylvania. *See id.* ¶¶ 10-11. Defendant's revenues received from Pennsylvania based contact are less than a fraction of one percent of its total revenues. *See* Def.'s Mot. at 4 & n.1. I find no evidence of extensive and pervasive contacts. Therefore, I conclude that defendant is not subject to the general jurisdiction



of the court.<sup>4</sup>

## **B. Specific Jurisdiction**

In the absence of general personal jurisdiction, an action arising from a defendant's forum-related conduct may be maintained on proof of specific personal jurisdiction. *See Helicopteros Nacionales de Colombia*, 466 U.S. at 414 n.8; *Imo Indus.*, 155 F.3d at 259. Specific jurisdiction is proper where two showings are made. First, it is necessary to demonstrate that the defendant has the requisite minimum contacts with the forum state. *See Burger King Corp.*, 471 U.S. at 474; *Imo Indus.*, 155 F.3d at 259. These contacts must be such that the defendant's conduct in the forum state demonstrates the purposeful direction or availment which underlies the personal jurisdiction inquiry. *See Burger King Corp.*, 471 U.S. at 472; *Imo Indus.*, 155 F.3d at 259. Where the conduct of a defendant is such that it reasonably should have foreseen being haled into court in the forum state, the necessary minimum contacts have been shown. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). If the necessary minimum contacts do exist, then courts inquire whether the exercise of personal jurisdiction would comport with traditional notions of "fair play and substantial justice." *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Burger King Corp.*, 471 U.S. at 485-86; *Imo Indus.*, 155 F.3d at 259.

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<sup>4</sup> Plaintiff argues that defendant has not averred that it has no other unrelated contacts with the state of Pennsylvania. *See* Pl.'s Resp. at 21-22. It is plaintiff's burden to prove the propriety of personal jurisdiction. Defendant has demonstrated the absence of a basis for general jurisdiction and plaintiff has offered no evidence in response. Further, defendant has adequately alleged a lack of unrelated contact with Pennsylvania. *See, e.g.*, Defs. Mot. Ex. A ¶¶ 7-8 & 14.

Whether a defendant has sufficient minimum contacts with the forum state is a fact-based inquiry which will vary from case to case. *See Burger King Corp.*, 471 U.S. at 485; *Farino*, 960 F.2d at 1224. While case law is helpful in delineating relevant factors, it is unlikely dispositive unless strikingly similar facts are presented. *See Farino*, 960 F.2d at 1224-25.<sup>5</sup> Further, courts need not determine the best or most logical place for personal jurisdiction. *See Strick Corp. v. A.J.F. Whse. Distribs., Inc.*, 532 F. Supp. 951, 960 (E.D. Pa. 1982). Rather, courts are to ensure that, consistent with the requirement of due process, a defendant is subjected to personal jurisdiction only where the defendant “purposefully directed its activities toward the residents of the forum state.” *See Burger King Corp.*, 471 U.S. at 472; *Imo Indus.*, 155 F.3d at 259; *Vetrotex Certainteed Corp.*, 75 F. 3d at 151.

In this matter, as in many before, the defendant’s forum-related conduct is comprised of

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<sup>5</sup> For this reason, I will not attempt to distinguish every case in which personal jurisdiction was not present. Rather, I note several where personal jurisdiction was proper given similar factual findings. In *Burger King Corp.*, the Supreme Court concluded that Michigan franchisee defendants were subject to personal jurisdiction in Florida. *See Burger King Corp.*, 471 U.S. at 482. The Court held that asserting personal jurisdiction was proper over defendants who had voluntarily entered a long-term contract with plaintiff, the terms of which subjected them to extensive regulation by plaintiff and provided that Florida law governed the contract, and where the course of dealing evidenced the flow of money and correspondence between the Michigan defendants and plaintiff’s Florida headquarters. *See id.* In *North Penn Gas Co.*, the Third Circuit found that personal jurisdiction was proper in Pennsylvania over a New York defendant where the defendant had a long-term business relationship with plaintiff, where the defendant had voluntarily entered a new contract with plaintiff, where the defendant actively assisted plaintiff in receiving federal approval of the contract, and where the defendant sent payment to plaintiff in Pennsylvania. *See North Penn Gas Corp. v. Corning Natural Gas Corp.*, 897 F.2d 687, 691 (3d Cir. 1990). Finally, in *Automated Med. Prods. Corp. v. International Hosp. Supply Corp.*, No. 97-CV2328, 1998 U.S. Dist. Lexis 1231, at \*13-14 (E.D. Pa. Jan. 30, 1998), the district court found personal jurisdiction in Pennsylvania proper as to a California corporation on the ground that defendant voluntarily and diligently bid on a contract from a federal agency located in Pennsylvania. *See id.* In all three cases, a non-forum defendant was subject to personal jurisdiction in the forum state as a result of negotiation, terms, and performance of a contract voluntarily entered.

acts and omissions alleged to constitute a breach of contract. *See* Compl. ¶¶ 1-3 & 9-21. The mere fact of a contract between a non-forum defendant and a forum plaintiff will not demonstrate constitutionally required minimum contacts. *See Burger King Corp.*, 471 U.S. at 478; *Vetrotex Certainteed Corp.*, 75 F. 3d at 151. On the other hand, the totality of the circumstances may demonstrate sufficient minimum contacts. *See, e.g., Burger King Corp.*, 471 U.S. at 479; *Vetrotex Certainteed Corp.*, 75 F. 3d at 151. Factors courts consider in evaluating the defendant's contacts with the forum state include the place and character of contract negotiations, the terms of the contract, the contemplated consequences of the contract, and the course of dealing between the parties. *See Burger King Corp.*, 471 U.S. at 479; *Strick Corp.*, 532 F. Supp. at 958. Considering these factors in light of the facts of this controversy demonstrates that defendant maintained sufficient minimum contacts with Pennsylvania to satisfy the due process requirement.

The character of negotiations here is ambiguous. On the one hand, the contract appears to be a form contract drafted by the plaintiff. *See* Pl.'s Resp. Ex. A(3); Def.'s Mot. Ex. A ¶ 22. Moreover, plaintiff initiated the relationship between the parties by soliciting letters of interest from Kentucky agencies such as defendant. *See* Pl.'s Resp. Ex. A ¶ 7; Def.'s Reply Ex. A (Letter of Stephen Fletcher). On the other hand, defendant responded voluntarily, efficiently and extensively to plaintiff's solicitation of interest by sending detailed corporate and biographical information to Pennsylvania. *See* Pl.'s Resp. Ex. A(1); Def.'s Reply Ex. B; cf. *Farino*, 960 F.2d at 1223 (noting plaintiff's efforts to secure a loan). Although defendant did not initiate contact with plaintiff, defendant is a sophisticated corporate entity which voluntarily and actively sought a long-term agency relationship.

The place of negotiation is ambiguous, too, as is often the case in an age where so many communications travel by fax, phone, and cable lines. *See Burger King Corp.*, 471 U.S. at 476. Each party sent written communication to the other. It is evident that defendant knew it was dealing with a Pennsylvania corporation. *See, e.g.*, Pl.'s Resp. Exs. A(1) & A(2) (addressing correspondence to Pennsylvania office). Defendant even expressed an interest in visiting plaintiff's office. *See* Pl. Resp. Ex. A(1) (Letter of May 9, 1996). Nonetheless, defendant did not visit plaintiff's office in Pennsylvania at any time. *See* Defs. Mot. Ex. A ¶ 24. In fact, plaintiff visited defendant's office in Kentucky prior to the parties executing the agreement. *See id.* ¶ 23; Defs. Supp. Exs. 1 & 2 (confirming meeting of April 30, 1996). Although physical presence in the forum state may support personal jurisdiction, its absence does not preclude personal jurisdiction. *See Burger King Corp.*, 471 U.S. at 476. Although defendant did not visit Pennsylvania, defendant knew it was dealing with a Pennsylvania entity for whom it sought to become a Kentucky agent. *See id.*

The terms of the relevant agency agreement favor finding that defendant purposefully availed itself of the laws of Pennsylvania in three respects. First, the contract expressly provided that it was to be governed by the law of Pennsylvania. *See* Pl.'s Resp. Ex. A(3) at 3 ¶ 21. Although a choice of law is not a choice of forum, it is evidence that defendant purposefully availed itself of the privileges and protections of the laws of Pennsylvania. *See Burger King Corp.*, 471 U.S. at 482-83. Second, defendant could be haled to Philadelphia to arbitrate contract disputes, and also possessed the power to hale plaintiff into arbitration proceedings in Philadelphia. *See* Pl.'s Resp. Ex. A(3) at 3-4 ¶ 23. Although the arbitration provision is not a choice of forum clause, I do find that it is evidence of the reasonable foreseeability of being haled

into Pennsylvania to resolve a contractual dispute. Third, defendant agreed to indemnify and defend plaintiff against all variety of losses caused by defendant. *See* Pl.'s Resp. Ex. A(3) at 3 ¶¶ 17-18. Defendant's connection with plaintiff was such that it reasonably could foresee that defendant's conduct could cause injury in Pennsylvania and require it to litigate in Pennsylvania. *See Burger King Corp.*, 471 U.S. at 480. In sum, defendant formed a contract to be governed by Pennsylvania law and subject to the possibility of arbitration or litigation in a Pennsylvania based action.

The contemplated consequences of the contract support personal jurisdiction in Pennsylvania. The contract was terminable on 90 days notice, but was not otherwise limited in time. Both parties appear to have contemplated a long-term relationship. *See* Def.'s Reply Ex. A; Pl.'s Resp. Ex. A(1) (May 9, 1996 Letter). Further, several contract provisions called for detailed records and communications to be sent from defendant to plaintiff in Pennsylvania. *See* Pl.'s Resp. Ex. A(3) at 1-2 ¶¶ 9-11. Defendant also obligated itself to send payment to Pennsylvania after any bond issue. *See id.* ¶¶ 17-19. Most important, defendant consented to be an agent of limited authority, requiring application to, and approval by, plaintiff prior to issuance of any bonds. *See id.* ¶¶ 2 & 8. When a defendant agrees to follow orders and regulations of an out-of-state plaintiff, it favors finding that defendant reasonably should have anticipated being haled into court out-of-state for an injury caused by breach of that agreement. *See Burger King Corp.*, 471 U.S. at 480.

Finally, the course of dealing between the parties supports personal jurisdiction in this matter. First, defendant sent to plaintiff bond applications, commissions, and payments over the course of two years. *See* Pl.'s Resp. Ex. A ¶¶ 17-18. Second, defendant received detailed

instructions from Pennsylvania relevant to bond issuance. *See* Pl.’s Resp. Ex. A(4) at 3 (Leadem Fax). Third, defendant entered the 1998 Agreement, which included a forum selection clause requiring litigation to be brought either in a certain Pennsylvania state court or in federal court in this district. *See* Pl.’s Resp. Ex. A(5). That contract clause, while not binding in this action, is evidence of the nature of the relationship between the parties, the forum, and the litigation. *See Burger King Corp.*, 471 U.S. at 480-81 (noting that course of dealing is evidence of relationship and expectations of parties); *Farino*, 960 F.2d at 1224 (same).

Defendant emphasizes that the relationship between the parties was centered in Kentucky. *See, e.g.*, Def.’s Supp. Exs. 1-5. In each of its submissions, defendant argues that it was plaintiff who “reached out” to defendant, with the implied result that defendant never purposefully directed its activities toward a Pennsylvania citizen. *See* Def.’s Mot. at 14-15; Def.’s Reply at 1-3; Def.’s Supp. at 1. This unidirectional reading appears to give undue significance to initiation. Analysis of the purposefulness of defendant’s conduct ought not be obscured by adherence to “‘mechanical’ tests.” *See Burger King Corp.*, 471 U.S. at 479 (citations omitted). Rather, courts focus on whether a “wholly passive defendant” has a relationship with the forum state cause by “plaintiff’s unilateral conduct.” *See Strick Corp.*, 532 F. Supp. at 958. *Cf. World-Wide Volkswagen Corp.*, 444 U.S. at 299 (describing customers decision to drive car out-of-state). “Thus, where the defendant ‘deliberately’ . . . has created ‘continuing obligations’ between himself and residents of the forum, . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by ‘the benefits and protections’ of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.” *See Burger King Corp.*, 471 U.S. at 475-76

(citations omitted).

This is such a case. Although plaintiff initiated the relationship between the parties and defendant never visited Pennsylvania, I find that defendant actively sought the agreement, should have known that the agreement would subject it to extensive control by a Pennsylvania corporation, subject to Pennsylvania's law, assented to terms which strongly suggested the possibility of litigation in Pennsylvania, and directed its activities toward Pennsylvania a number of times in the course of performance and dealing. *See Automated Med. Prods. Corp. v. International Hosp. Supply Corp.*, No. 97-CV-2328, 1998 U.S. Dist. Lexis 1231, at \*13 (E.D. Pa. Jan. 30, 1998) (finding specific personal jurisdiction where defendant "voluntarily associated itself with Pennsylvania" by actively seeking a contract with an agency based in Pennsylvania). I conclude that by purposefully directing its activities toward a resident of the Pennsylvania, and by contractually availing itself of the privileges and protections of Pennsylvania's law, defendant established sufficient minimum contacts to reasonably foresee being haled into court in Pennsylvania.

### **C. Fair Play and Substantial Justice**

The court must now determine whether personal jurisdiction over defendant would offend traditional notions of "fair play and substantial justice." *See Burger King Corp.*, 471 U.S. at 477; *Farino*, 960 F.2d at 1226. Defendant bears the burden of persuasion on this matter, and must "show that the assertion of jurisdiction is unconstitutional." *See Farino*, 960 F.2d at 1226. A "compelling case" must be presented that jurisdiction would not be reasonable in light of factors

articulated by the Supreme Court. *See Burger King Corp.*, 471 U.S. at 477; *World-Wide Volkswagen Corp.*, 444 U.S. at 292. “These factors include: ‘the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.’” *Farino*, 960 F.2d at 1222 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

Defendant addresses the fairness and justice of exercising personal jurisdiction over it in Pennsylvania, but does not present the compelling evidence necessary to demonstrate that such jurisdiction would be unreasonable. First, defendant argues that four of the five members of its bond department likely would be called as witnesses, jeopardizing “the operations of Accordia’s bond office in Louisville.” *See* Def.’s Mot. at 21; *id.* Ex. A ¶ 37; *id.* Ex. E. No record evidence is presented as to the impact manager absence would have on the office. Nor is it shown to a compelling degree that no reasonable accommodations exist, e.g., e-mail, fax, or phone communication. In light of modern methods of transportation and communication, I do not find that the burden of providing testimony at a trial in Pennsylvania would be incompatible with traditional notions of fair play and substantial justice. The cases cited by defendant are inapposite.<sup>6</sup>

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<sup>6</sup> Defendant cites three cases. First, *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987), is cited for the proposition that a severe burden on defendant defeats personal jurisdiction. *See* Def.’s Mot. at 21. In *Asahi*, the Supreme Court focused on the burden of litigating in a foreign country, which bears no resemblance to any account of the facts in this matter. *See Asahi Metal Indus. Co.*, 480 U.S. at 114 (noting the distance between Japan and California but emphasizing “the unique burdens placed upon” a Japanese corporation which must submit its claim against a Chinese corporation to the courts of California “in a foreign legal



Defendant finally suggests that efficiency would be served by litigating in Kentucky. Defendant notes that the majority of persons identified in the respective Self-Executing Disclosures are Kentucky residents. *See* Def.’s Mot. Exs. D & E (citing Self-Executing Disclosures of each party). In addition to being mere preliminary identification of persons to facilitate discovery, the lists demonstrate only that a bare majority of persons with relevant information are located in Kentucky. *See id.* Ex. D (identifying seven of thirteen of plaintiff’s disclosures as persons in Kentucky); *id.* Ex. E (identifying four of six of defendant’s disclosures as persons in Kentucky). Although this consideration marginally favors transferring the action to Kentucky, it does not amount to the required “compelling case.” *See Burger King Corp.*, 471 U.S. at 477. Therefore, I conclude that the assertion of personal jurisdiction over defendant comports with traditional notions of fair play and substantial justice.

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system”). Second, defendant cites *International Shoe* for the proposition that “[t]o require the corporation in such circumstances to defend the suit away from its home . . . where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation.” *See* Def.’s Mot. at 21 (citing *International Shoe*, 326 U.S. at 317) (internal omission in original). The citation misconstrues the import of the paragraph from which it is drawn. The “circumstances” the Court characterized as unreasonable were explained to be attempts to premise *general jurisdiction* on “the casual presence of the corporate agent or even his conduct of single or isolated items of activities.” *See International Shoe*, 326 U.S. at 317. The passage sheds no light on the reasonableness of a suit where *specific jurisdiction* is premised on minimum contacts. Finally, defendant cites *Slota v. Moorings*, 494 A.2d 1, 5 (Pa. 1985). In *Slota*, four plaintiffs, two from Pennsylvania, brought an action against a British Virgin Islands corporation that provided plaintiffs with boat and hotel accommodations in the British West Indies. *See Slota*, 494 A.2d at 2. The defendant’s only North American office was in New Orleans, and the action was for loss incurred during a burglary in the British West Indies. *See id.* Because not all of the plaintiffs were Pennsylvania citizens, because no Pennsylvania law was applicable, because the defendant had no contact with Pennsylvania except the citizenship of two plaintiffs, and because the cause of action arose from events in the British West Indies, the Pennsylvania Supreme Court held that personal jurisdiction in Pennsylvania would be unreasonable. *See id.* at 5. It is enough to distinguish this case that defendant entered and performed a contract establishing a long and continuing relationship with a Pennsylvania citizen and governed by Pennsylvania law.

## II. VENUE

Even if personal jurisdiction is proper in this court, defendant suggests that the action should be dismissed because venue is improper. In the alternative, defendant contends that venue would be more proper in, and thus the action should be transferred to, the United States District Court for the Western District of Kentucky. I disagree.

### A. Proper Venue

Defendant seeks dismissal of this action pursuant to Fed. R. Civ. P. 12(b)(3) on the ground that venue is improper in this district. In a diversity action, venue is proper in a district where the defendant resides. *See* 28 U.S.C. § 1391(a)(1). Within the meaning of the federal venue provision, a corporate defendant resides “in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.” *See* 28 U.S.C. § 1391(c). Because defendant is subject to personal jurisdiction in this district, I conclude that venue is proper herein. *See Superior Precast, Inc. v. Safeco Ins. Co. of Am.*, No. 99-CV-2816, 1999 U.S. Dist. Lexis 16160, at \*8-9 (E.D. Pa. Oct. 4, 1999) (noting that venue is proper over single corporate defendant in district where defendant is subject to personal jurisdiction); *Automated Med. Prods. Corp.*, 1998 U.S. Dist. Lexis 1231, at \*14-15 (same).<sup>7</sup>

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<sup>7</sup> If multiple defendants were involved, each of whom was a citizen of a non-forum state and only one of whom was a resident of Pennsylvania, the analysis would be different. *See Madotto v. Rosman*, No. 98-CV-3221, 1998 U.S. Dist. Lexis 20025, at \*13-16 (E.D. Pa. Dec. 10, 1998) (discussing different import of section in cases of multiple defendants, all citizens of a non-forum state). That situation is not presented, despite the fact that the caption lists two

Because venue is proper in this district, neither dismissal pursuant to Fed. R. Civ. P. 12(b)(3) nor transfer pursuant to 28 U.S.C. § 1406(a) is appropriate.

## **B. Change of Venue**

Defendant suggests that venue would be more proper in the Western District of Kentucky, to which this action should be transferred. Statutory authority for such a suggestion is found in 28 U.S.C. § 1404(a), which provides that “[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a). The decision to grant a motion for change of venue lies within the discretion of the trial court. *See Shutte v. ARMCO Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970); *Superior Precast Ins. v. Safeco Ins. Co. of Amer.*, 71 F. Supp. 2d 438, (E.D. Pa. 1999). That discretion is to be exercised in light of the strong presumption in favor of the plaintiff’s choice of forum. *See Shutte*, 431 F.2d at 25; *Superior Precast Ins.*, 71 F. Supp. 2d 438. The defendant bears the burden of proving that convenience and justice would be served by transferring the action to another district. *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).

To assess properly the convenience and justice of litigation in a particular forum, courts consider a host of factors relevant to both private and public interests. *See Jumara*, 55 F.3d at (explaining what should be present in a district court opinion).

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defendants. The reason is simple. Although the parties disagree as to whether Accordia of Kentucky is the legal successor-in-interest to ReagerHarris, it is not disputed that Accordia purchased ReagerHarris, and that only one entity exists at this time. *See* Def.’s Mot. Ex. A ¶ 1.

## **1. Private Interests**

The private interests to be considered include: (1) plaintiff's forum preference as manifested in the original choice; (2) defendant's preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses--but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the location of books and records (similarly limited to the extent that files could not be produced in the alternative forum). *See Jumara*, 55 F.3d at 879.

Plaintiff's choice of forum, entitled to deference, is the Eastern District of Pennsylvania. Defendant, on the other hand, would prefer that the litigation be conducted in the Western District of Kentucky. Although the claim arose in Kentucky, where it is alleged the defendant acted negligently, the claim does not concern a fixed physical object such that situs is of great import. Rather, the claim involves the relationship between a principal and an agent, where directives were issued from Pennsylvania and implemented in Kentucky. Moreover, each party is a sizable corporate entity handicapped neither physically nor financially by the prospect of litigation in a distant forum. Defendant alleges that more than half of identified witnesses are residents of Kentucky, but makes no allegation or showing that they would be unavailable for litigation in Pennsylvania. Nor is there any evidence that the choice of forum will affect the availability of books and records.

I find that either party will incur some degree of additional expense and inconvenience in litigating in an out-of-state forum. Transfer is not appropriate, however, where the effect of

transfer would be simply to shift the inconvenience from the defendant to the plaintiff. *See Righttime Econometrics Inc. v. Ashworth*, No. 95-CV-807, 1995 U.S. Dist. Lexis 15328, at \*4 (E.D. Pa. Oct. 18, 1995). “[U]nless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff’s choice of forum should prevail.” *Shutte* 431 F.2d at 25; *Superior Precast Ins.*, 71 F. Supp. 2d 438; *Edwards v. Texaco, Inc.*, 702 F. Supp. 101, 103 (E.D. Pa. 1988). I conclude that the private interests do not so strongly favor defendant such that they alone would justify transfer to Kentucky.

## **2. Public Interests**

The public interests to be considered include: (1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the fora; and (6) the familiarity of the trial judge with the applicable state law. *See Jumara*, 55 F.3d at 879-80.

No reason is presented why a judgment in this court would be unenforceable against defendant. Nor are practical considerations delineated which would favor transfer to Kentucky. Although the courts in this district maintain a busy docket, I have no evidence before me suggesting that matters are resolved substantially faster in Kentucky than in this district. Moreover, the public policies of neither state are addressed by either party, and thus do not favor a transfer of venue.

Kentucky is alleged to have a strong local interest in this matter because defendant is

incorporated in Kentucky, because plaintiff could not issue bonds in Kentucky prior to being licensed in that state, and because the alleged events or omissions giving rise to the action occurred in Kentucky. *See* Def.’s Mot. at 22. Plaintiff alleges that Pennsylvania has “a strong interest in protecting its residents and providing a forum for resolution of their disputes.” *See* Pl.’s Resp. at 24 (quoting *Elbeco Inc. v. Estrella de Plato Corp.*, 989 F. Supp. 669, 679 (E.D. Pa. 1997)). I find that Kentucky’s interest in the issuance of bonds is only marginally implicated by this action, the heart of which is a dispute between a principal and an agent over scope of authority. The bond has been issued and creditor’s have been paid. Therefore, the local interests of the two states are in equipoise, each being tied to a party’s citizenship within its borders. In addition, this court is more likely to be familiar with Pennsylvania law of contract and agency, which governs this contract. *See* Pl.’s Resp. Ex. A(3) ¶ 21. I conclude that the public interests implicated do not strongly favor defendant’s choice of forum. Therefore, the motion for change of venue will be denied.

## CONCLUSION

Plaintiff solicited expressions of interest from sophisticated commercial entities, including defendant. Defendant then actively sought to be plaintiff’s agent in Kentucky. In so doing, it directed its sales pitch to a Pennsylvania citizen. Having won a contract, it then agreed to abide by the orders and instructions given by plaintiff, to send material information to plaintiff, to remit payment to plaintiff, and to safeguard plaintiff’s interests. In the course of dealing, defendant did provide information and payment to plaintiff, and received orders from plaintiff as

well. Further, defendant agreed that the contract was to be governed by Pennsylvania law and that disputes related to the contract could be resolved in Pennsylvania. In light of its purposeful direction of activity toward a Pennsylvania citizen and its deliberate creation of a continuing relationship with a Pennsylvania citizen, I hold that defendant is subject to personal jurisdiction in this court. Further, because defendant is subject to personal jurisdiction in this district, I hold that venue is proper in this district. Finally, I hold that neither convenience of the witnesses and parties nor the interests of justice require transferring this action to the Western District of Kentucky. Therefore, defendant's motion to dismiss the action or, in the alternative, to transfer the action, will be denied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MOUNTBATTEN SURETY INC.,  
Plaintiff,

v.

REAGERHARRIS INC. and ACCORDIA OF  
KENTUCKY, INC.,  
Defendant.

: CIVIL ACTION  
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:  
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: NO. 99-3052  
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**Order**

And now, this            day of January, 2000, upon consideration of defendant's Motion to Dismiss for Lack of Jurisdiction Over the Person and Improper Venue or, In the Alternative, to Transfer the Action (Doc. No. 9), plaintiff's Response thereto (Doc. No. 11), defendant's Reply in Support of their Motion (Doc. No. 12), and defendant's Supplement to their Motion (Doc. No. 13), it is hereby ORDERED that the motion is DENIED.

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William H. Yohn, Jr., Judge